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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARC MAUSETH and MARY HOFFMANN, husband and wife; COME TO TUBAC, LLC; GARY A. and CYNTHIA GAYE ROSE, husband and wife, dba TURQUOISE ANGEL ART GALLERY; CARLTON TROY, a single man; CATHERINE TROY, a single woman; and LOS GATOS LOCO, LLC, Plaintiffs/Appellants, v. TUBAC CHAMBER OF COMMERCE, INC., an Arizona corporation; BRUCE PHENEGAR and CAROL CULLEN, husband and wife; and GARY and LISA HEMBREE, husband and wife, Defendants/Appellees.	2 CA-CV 2008-0031 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV-07-087

Honorable James A. Soto, Judge

AFFIRMED

Robert M. Ferrier — Tucson
Attorney for Plaintiffs/Appellants

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By Thomas J. Davis — Tucson
Attorneys for Defendants/Appellees

V Á S Q U E Z, Judge.

¶1 Appellants Marc Mauseth and other Tubac business owners (collectively, "the owners") appeal from the trial court's summary judgment in favor of appellees, the Tubac Chamber of Commerce, and a number of its officers and employees ("the Chamber"). The owners argue the court erred by finding the Chamber's placement of markings for the location of booths, which the owners believed would have blocked access to their businesses during the Tubac Festival of the Arts, did not support a valid cause of action for intentional interference with business expectancies. For the reasons stated below, we affirm.

Facts and Procedural Background

¶2 "Although the pertinent facts of this case are largely undisputed, we view them in the light most favorable to the party opposing the summary judgment motion below." *Keonjian v. Olcott*, 216 Ariz. 563, ¶ 2, 169 P.3d 927, 928 (App. 2007). The Chamber operates the annual Tubac Festival of the Arts at which vendors sell their wares from booths set up on property in the commercial areas of Tubac. On February 4 or 5, 2007, two or three days before the start of the festival, the Chamber spray-painted boundaries and numbers indicating where the booths would be located. Believing the booths would block access to their businesses, the owners on February 6 filed a complaint in Santa Cruz County

Superior Court seeking a temporary restraining order and a permanent injunction prohibiting the Chamber from placing any booths within fifteen feet of their property lines. The trial court scheduled a hearing on the injunction and on the owners' additional claims for compensatory and punitive damages but denied the owners' request for a temporary restraining order.

¶3 The Chamber never placed any booths in the challenged locations. However, based on prior dealings between the parties, including a previous lawsuit, the owners believed the Chamber had deliberately placed the booth markings to harass them. Thus, after the festival had ended, they proceeded with the litigation on their application for a permanent injunction and their claim for intentional interference with business expectancies.[1] They sought compensatory damages for "the time associated with filing th[e] action, . . . lost sales/profits due to having to take time away from pre-festival preparations to deal with this law suit, the costs of bringing this action, [and] punitive damages in an amount to deter the [Chamber] from similar conduct in the future."

¶4 The Chamber moved for summary judgment, arguing the owners had "failed to produce any evidence of even one of the elements of the tort claim for intentional interference with contract or business expectation." After oral argument, the court granted the Chamber's motion, finding the owners had failed to establish the Chamber had acted improperly, the owners had "suffered no compensable damages as a result of [the

[1]On appeal, the owners do not challenge the trial court's finding that they abandoned their claim for intentional infliction of emotional distress.

Chamber]'s actions," and "the issue of [the Chamber's] ill-will toward the [owners], if any, is not material to the issues before the court." The owners challenge these findings on appeal.

Discussion

¶5 A trial court properly grants summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). On appeal from summary judgment, we review de novo whether a genuine issue of material fact exists and whether the trial court correctly applied the law. *Miller v. Hehlen*, 209 Ariz. 462, ¶ 5, 104 P.3d 193, 196 (App. 2005). To establish a claim for tortious interference with contract or business expectancies, a plaintiff must prove "the existence of a valid contractual relationship or business expectancy; the interferer's knowledge of the relationship or expectancy; intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted." *Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors*, 184 Ariz. 419, 427, 909 P.2d 486, 494 (App. 1995).

¶6 In this case, the owners based their claim for loss of business expectancies entirely on their perception that the Chamber "caused markings for Festival booths to be placed in such a way that [the owners] reasonably believed that those booths would completely block access to their businesses during the Festival." On appeal, they challenge the trial court's finding that the Chamber had not acted improperly. But as the court noted,

"it is uncontested that the [Chamber] did not place any booths in front of the [owners'] businesses." And the owners conceded as much in their complaint, stating the Chamber ultimately "did not place booths upon or adjoining [their] property."

¶7 The trial court also correctly found that even assuming the Chamber actually had placed the booths as marked, such conduct would not have been improper because it had obtained the necessary permit "to place the booths in question on the county right-of-way." *See Hampton v. Glendale Union High Sch. Dist.*, 172 Ariz. 431, 436, 837 P.2d 1166, 1171 (App. 1992) ("[W]here breach of a contract is caused by an act which a person has a definite, legal right to do without any qualification, there is no liability for inducing such breach."), *quoting Ulan v. Lucas*, 18 Ariz. App. 129, 130, 500 P.2d 914, 915 (1972); *see also Bar J Bar Cattle Co. v. Pace*, 158 Ariz. 481, 483, 763 P.2d 545, 547 (App. 1988) (interference must be improper before liability will attach).

¶8 The owners nonetheless contend the Chamber's actions caused them to suffer direct economic harm in "having to prepare and file their Complaint in the trial court instead of preparing for the busiest shopping days of their economic year." But, as the trial court noted, although the Chamber's actions may have prompted the owners to "t[ake] time to file this action and seek a temporary restraining order against [the Chamber, this] does not constitute economic loss under the legal test [for intentional interference with business expectancies]."[2] Any expenses the owners incurred as a result of pursuing litigation were

[2]The existence of actual damages is a "factual issue[] usually decided by the jury," *Gipson v. Kasey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228, 230 (2007), but where a plaintiff "has sustained no damages, he has no cause of action," *Amfac Distrib. Corp. v. Miller*, 138 Ariz.

not the result of any disruption in their relationship with actual or potential customers. *See Dube v. Likens*, 216 Ariz. 406, ¶ 14, 167 P.3d 93, 98 (App. 2007) (damage suffered must result from interference with business relationship).

¶9 Although the owners generally assert that they incurred "damages related to business loss as a result of shipments and restocking of wares that w[ere] actually delayed," more is required to sustain a claim for loss of business expectancies. The owners must "identify [a] specific relationship with which the defendant interfered," and they have simply failed to do so. *Id.* ¶ 19; *see also Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So.2d 812, 815 (Fla. 1994) ("As a general rule, . . . an action for tortious interference with a business relationship requires a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered.").

¶10 In sum, the trial court correctly concluded that the owners' claim fails as a matter of law. First, they failed to allege any action on the part of the Chamber, let alone improper action, that interfered with their business expectancies. Second, they failed to establish the existence of any business expectancy, the loss of which could have resulted in compensable damages. We thus conclude the trial court properly granted summary

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152, 154, 673 P.2d 792, 794 (1983).

judgment. *See Boatman v. Samaritan Health Svcs., Inc.*, 168 Ariz. 207, 211-12, 812 P.2d 1025, 1029-30 (App. 1990).[3]

Disposition

¶11 For the reasons stated above, we affirm the trial court's grant of summary judgment. The Chamber has requested an award of attorney fees on appeal as a sanction pursuant to Rule 11, Ariz. R. Civ. P. With respect to the proceedings below, the Chamber failed to request Rule 11 sanctions in the trial court and has thus waived this issue on appeal. *See Woodworth v. Woodworth*, 202 Ariz. 179, ¶ 29, 42 P.3d 610, 615 (App. 2002) (issue not raised below waived on appeal). And, because Rule 11 is not an appropriate basis for an award of attorney fees on appeal, we deny the Chamber's request for such fees. *See City of Phoenix v. Phoenix Employment Relations Bd.*, 207 Ariz. 337, ¶ 30, 86 P.3d 917, 925 (App. 2004); *see also* Ariz. R. Civ. App. P. 25 (authorizing award of fees against party bringing frivolous appeal). As the prevailing party, however, the Chamber is entitled to costs upon compliance with Rule 21, Ariz. R. Civ. App. P.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

[3]Because the record supports the trial court's ruling that the Chamber did not improperly interfere with any business relationship and the owners failed to allege compensable damages, we need not address the owners' argument that the court erred in finding "the subjective intent of the [Chamber] was irrelevant to the trial court's consideration of whether the [Chamber] had acted improperly."

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge